

Football and Fair Dealing: Telstra v Premier Media Group

Andrew Stewart discusses *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd & Anor [2007] FCA 568*,

Introduction

As evidenced in "The Panel" case between the Nine and Ten television networks, the fair dealing exceptions in the *Copyright Act 1968* (Cth) present challenges to both copyright owners and users. Those challenges expand as the content delivery platforms enabled by the expansion of digital technologies increase.

The case of *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd & Anor [2007] FCA 568*, is one of the first in the world to grapple with those challenges, such as the unresolved issue of the outer limits of the fair dealing exceptions and the application of those exceptions in the "new media" space.

Although the decision was interlocutory in nature, it points to the courts taking a robust approach to the application of the fair dealing exceptions. The judgement also suggests that it may be difficult to convince a court that the exceptions should be applied differently as between the "established" media of free to air and pay TV and the "new" media of online and mobile.

The Facts

Through Telstra Bipond, Telstra exclusively licenses the broadcast and cinematograph film rights for matches conducted by the National Rugby League (*NRL*) for communication to the public via the internet and 3G enabled mobile phones. Telstra held a version of those rights since 2001 and entered into a new licensing arrangement

in October 2006 as part of a new sponsorship agreement with the *NRL*.

Under the licensing arrangement with the *NRL*, Telstra is entitled to show:

- full *NRL* matches, and highlights from those matches of unlimited length, but not until 24 hours after the conclusion of the particular matches; and
- highlights of *NRL* matches of not more than five minutes per match within the 24 hour period after the conclusion of the particular match.

Telstra's rights also enable it to operate, and generate revenue from, the *NRL* website.

Premier Media Group produces a suite of pay TV channels which it supplies to Foxtel, Austar and Optus for broadcast on the Foxtel and Austar pay TV platforms. Those channels include three dedicated sports content channels, FOX SPORTS 1, 2 and 3 and a 24/7 dedicated sports news channel, FOX SPORTS NEWS.

Pursuant to an agreement with the *NRL*, Premier Media Group is the exclusive licensee of rights in *NRL* content for pay TV, with the free to air rights being held by the Nine Network. Premier Media Group produces coverage of *NRL* matches on the FOX SPORTS channels and news stories relating to sporting events on FOX SPORTS NEWS.

Premier Media Group also supplied sporting news content from FOX SPORTS

Volume 26 N° 1
October 2007

Inside This Issue

Football and Fair Dealing:
Telstra v Premier Media Group

Issues for Corporates and
Regulators in *Second Life* and
Virtual Worlds

Right Place Right Time for National
Indigenous Television

High Court Takes The Wind out of
Shipbuilders Sails

A Very Expensive Lobster

Managing Media Organisations

Communications Law Bulletin

Editors: Matt Vitins & Page Henty

Printing & Distribution: BEE Printmail

Website: www.camla.org.au

Contents

Football and Fair Dealing: Telstra v Premier Media Group

Andrew Stewart discusses *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd Anor* [2007] FCA 568,

Issues for Corporations and Regulators in *Second Life* and Virtual Worlds

Nick Abrahams looks at what virtual worlds are, why they are important, and forecasts the legal issues that could become relevant to virtual residents.

Right Place Right Time for National Indigenous Television

John Corker introduces the National Indigenous Television Service and the legislative history behind its inception.

High Court Takes The Wind out of Shipbuilders Sails

Marina Lloyd Jones reports on a recent decision in which the High Court considered the meaning of 'artistic craftsmanship and the copyright / design overlap.

A Very Expensive Lobster

Jennifer Lusk revisits *Blue Angel Restaurant v John Fairfax and Sons Ltd* (1989) and the mutual dislike that exists between defamation law and restaurant reviewers.

Managing Media Organisations

William Walder considers the political and technical context that motivated last year's media law reforms.

NEWS to News Digital Media Pty Limited for use on the foxsports.com.au website which, at the time, was jointly operated by Premier Media Group and News Digital Media. Additionally, Premier Media Group also supplies sporting news content to mobile telephone operators Hutchison and Vodafone, as well as Telstra. This content included, but was not limited to, reports on the outcomes of NRL matches.

The FOX SPORTS NEWS content which was the subject of the proceedings consisted of hosted reports on the outcomes of NRL matches similar in format to traditional news reporting. The reports were illustrated with selected footage from the relevant NRL matches. The length of footage used varied, in some cases up to two and a half minutes.

In supplying news sports content for use on the foxsports.com.au website and on the mobile networks, Premier Media Group relied on the fair dealing exception contained in section 103B of the *Copyright Act*.

The Proceedings

Telstra commenced proceedings by way of an order for short service seeking an interlocutory injunction from the Federal Court to restrain Premier Media Group (in the case of online and mobile) and News Digital Media (in the case of online) from:

- using more than 45 seconds footage of any one NRL match in a report;
- using more than 90 seconds footage of any NRL matches (in total); and
- making any report available for more than 24 hours after the conclusion of the earliest match referred to in the report.

In its opening submissions, Telstra asserted that it had formulated the orders generously, permitting Premier Media Group to use an amount of footage clearly beyond an amount that the Court would likely find constituted fair dealing at a final hearing.

In summary, Telstra argued that Premier Media Group's and News Digital Media's use did not fall under the protection of the fair dealing exception because:

- the uses of NRL footage exceeded the long established conventions in the free to air and pay television industries; and
- even if the uses of NRL footage complied with those long established conventions, the sophisticated market for sporting content rights and the "unique circumstances" of the continuous, on demand availability of content delivered via the internet

or 3G mobile, meant that those conventions should not apply to the new media context.

To support those arguments, Telstra pointed to a number of factors which it said affected the fairness of the use by Premier Media Group and News Digital Media of NRL footage. These included that:

- News Limited, being a part owner of the NRL, Premier Media Group and 100% owner of News Digital Media, was effectively granting rights with one hand (through the NRL) and then taking away with the other (through Premier Media Group and News Digital Media);
- the continuous, on demand nature of new media required a different approach to the fair dealings exceptions; namely that shorter extracts should be used which are available for a restricted time; and
- in supplying content from FOX SPORTS NEWS for use in the new media space, Premier Media Group was not itself using the NRL footage for the purpose sanctioned by section 103B of the *Copyright Act*, but was merely supplying content pursuant to a business arrangement.

The Decision

For the purposes of the interlocutory hearing, there was no dispute that the material supplied by Premier Media Group for online and mobile use contained a substantial part of the work over which Telstra had exclusive rights, namely the coverage of an NRL match. Also, there was no dispute at the interlocutory stage that the outcomes of NRL matches were newsworthy.

Accordingly, the questions to be considered by the Court at the interlocutory phase were whether:

- Telstra had demonstrated a prima facie case that Premier Media Group and News Digital Media were not entitled to rely on s103B of the *Copyright Act*, and were therefore infringing Telstra's exclusive rights in NRL footage; and
- the balance of convenience favoured Telstra.

In deciding that Telstra had failed to establish a prima facie case and that the balance of convenience favoured Premier Media Group and News Digital Media, Allsop J made a number of points with respect to Telstra's argument. In summary these included:

- Modern news journalism relies on the use of adequate visual images and the viewing public expect that news reports about sporting events will be illustrated with vision of those sporting events. This expectation is the basis of the public interest protected by section 103B of the *Copyright Act*.
- Fair dealing is always a matter of judgement and impression but the following factors detracted from Telstra's argument that the length of footage used by Premier Media Group exceeded that which was fair:
 - Evidence was tendered by Premier Media Group of comparable examples of sports news reporting from both free to air and pay TV which included similar lengths of footage;
 - In December 1995, Telstra had asserted in the context of AFL matches that use of 1 minute per quarter and 2 minutes at the end of an AFL match constituted fair dealing; and



- What industry participants view as fair dealing is unlikely to be determinative of what constitutes fair dealing but a general view about the legitimacy of a certain length of footage would be a relevant consideration.
- There was insufficient evidence on an interlocutory basis to support the argument that there ought to be a different set of rules applying to the internet and online as compared with free to air and pay television. Allsop J acknowledged that the matter would need to be further ventilated at the final hearing, which might lead to a conclusion that different rules should apply as between the established media and new media.
- The fact that News Limited had ownership interests in the body which granted Telstra its exclusive rights and the organisations accused of infringement was irrelevant, particularly given that Telstra had clearly entered into its arrangement with the NRL in the

knowledge that third parties could rely on the fair dealing entitlement. The judge specifically referred to the fact that the Telstra/ NRL sponsorship agreement contained a provision to this effect.

- Although the outer limits of what constituted a "fair" amount of footage were a matter for the final hearing, 45 seconds of footage (as reflected in the form of Telstra's orders) was clearly a "bare minimum" of what could be used to illustrate and the test of what was fair was not what was the bare minimum required to report news.
- The fact that Premier Media Group was supplying other parties with the news stories for use on mobile networks, did not deprive it of the ability to rely on the fair dealing defence. Allsop J took the view on an interlocutory basis that at the very least, Premier Media Group's conduct was associated with the reporting of news, as required by section 103B of the *Copyright Act*.

On the issue of balance of convenience, Allsop J noted that although Telstra had not unreasonably delayed in commencing the proceedings, Premier Media Group had not “sprung a massive surprise” as it had been engaging in very similar conduct during at least 2006. The fact that Premier Media Group had existing contractual relationships which would be detrimentally affected by the granting of the injunction was one of the factors which lead Allsop J to take the view that the balance of convenience favoured Premier Media Group.

Allsop J dismissed the interlocutory application and awarded costs to Premier Media Group and News Digital Media.

Implications

As the proceedings settled shortly after the interlocutory hearing, some care needs to be taken in analysing the implications of the decision. Having said that, if other judges follow the directions set by Allsop J in this case, a number of conclusions can be drawn.

Duration of fair dealing

Contrary to the popular view, fair dealing, at least for the purposes of reporting news, is likely to be measured in minutes rather than seconds.

Previous decisions in the UK, such as *British Broadcasting Corporation v British Satellite Broadcasting Limited* [1992] Ch 141, and in Australia, such as *TCN Channel Nine Pty Limited & Ors v Network Ten Limited* 2001 [FCA] 108 and *Thoroughvision Pty Limited v Sky Channel Pty Limited* [2005] FCA 1527 each considered the use of footage of approximately 10 to 45 seconds. Accordingly this was the first audio visual copyright case in either the established or new media worlds to consider the potential outer limits of the fair dealing exception in the audio visual context.

Given His Honour’s view that he was not convinced of any difference in the application of fair dealing between established and new media, his comments regarding 45 seconds representing a bare minimum apply equally to fair dealing in the new media space as to the free to air and pay TV contexts. It should be noted however that it is not possible to draw clear lines and each instance will have to be judged on its merits.

Newsworthiness

Additionally, the length of time that material can be used for under fair dealing is not going to be strictly limited to short

durations such as 24 hours. The Judge’s analysis of how long a news report remains “newsworthy” points to a robust approach to this issue.

Ultimately, perhaps, the issue is not so much the province of lawyers but of editorial staff of media organisations. While the issue may become somewhat clouded in the context of commercial competitors and the fight for ratings in the established media world and page impressions or clicks in new media, nonetheless if a journalist judges reasonably that something continues to be newsworthy, then it may well be.

Technology Neutrality

The reluctance of Allsop J to accept Telstra’s assertions that new media requires new rules, appears to be an example of the Court taking an approach consistent with the underlying intention that the *Copyright Act* be technology neutral. While we will not have the benefit of detailed evidence and submissions on this point, the argument for different rules as between television on one hand and internet and mobile on the other, in the writer’s view, suffer from some significant flaws.

Firstly, the argument relies upon the assertion that the new media landscape delivers content in a non-linear way, that is, the consumer controls when and how often they access a particular piece of content. By way of contrast, free to air and pay television providers determine when and how often a viewer receives the content. Accordingly, the opportunity for multiple viewing does not exist in the established media environment. It seems somewhat strange to argue that an exception to the *Copyright Act* intended to protect the public interest in receiving news should apply in a more limited way in the new media context merely because the public has a greater degree of control over its access to news reports in the online environment or by mobile.

In any case, in the current environment of digital video recorders, including Foxtel IQ, Microsoft Media Centre PC’s and TiVo (available in the US and now in Australia) the days of the content supplier determining the when and how of content delivery are numbered. These devices enable linear content to be rendered in a non-linear way. The linear/non linear argument is rapidly becoming obsolete.

Secondly, and perhaps more significantly, it is difficult to sustain a discriminatory approach to the different forms of media,

or more accurately, content delivery in the face of true convergence. This can be illustrated in the case of mobile content. There may be an argument that in the context of mobile phones, a different set of rules is required given that consumers tend only to look at small amounts of audio visual material on the relatively small screen of a handset. Given that an element of the fair dealing defence is the commercial impact of the use on the copyright owner or exclusive licensee, the ability of non-rights holders to use amounts of footage that correspond to a consumer’s attention span on a small screen may have an impact on the commercial value of such rights.

However, once any form of content can be delivered via a mobile device and the consumer can choose whether to view the content on the inbuilt screen or on a larger display panel, it becomes impossible, from a fair dealing perspective, to discriminate between content delivered to a mobile device and content delivered to a traditional television set.

Technology has advanced to the stage when mobile devices can be “hooked up” to larger screens. The practical and legal distinctions between mobile and other devices are now moot.

New media value

Regardless of the view taken on how the fair dealing exception should be applied, the fact that Telstra was moved to attempt to protect its rights in NRL content in the new media space demonstrates that there is significant commercial value in new media rights. How parties may value those rights, particularly clips rights, after this case remains to be seen, but it is likely that this will not be the last case to consider what is fair in the new media space.

Note: The writer represented Premier Media Group in these proceedings but the views expressed are his own.

Andrew Stewart is a Partner at Baker & McKenzie, Sydney.